U.S. Department of Homeland Security
20 Mass. Ave, N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 17 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy
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DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of pneumatic tools and equipment. It seeks to employ the beneficiary in the United States permanently as an export marketing executive. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered from the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is July 8, 2002. The beneficiary's salary as stated on the labor certification is $70,000 per year.

Initial submissions with the Immigrant Petition for Alien Worker (Form I-140) encompassed a letter of support, dated March 18, 2003, from the petitioner's controller, Jon Aldrich (Aldrich1). The petitioner, also, provided the beneficiary's 2001 Form 1040, U.S. Individual Income Tax Return. It reported adjusted gross income of $1,609. Further, his 2001 and 2002 Wage and Tax Statements (Forms W-2) reflected wage payments from the petitioner, viz., $14,777.60 and $16,187.78 in the respective years. The director considered that the initial evidence did not suffice as to the ability to pay the proffered wage at the priority date and continuing to the present.

In a request for evidence (RFE), dated April 8, 2003, the director detailed additional evidence, needed to establish the petitioner's ability to pay the proffered wage as of the priority date. The RFE specified annual reports, federal tax returns, or audited financial statements, as stated in 8 C.F.R. § 204.5(g)(2), *supra*.[1] Also, the RFE exacted the Employer's Quarterly Federal Tax Return (Form 941) with schedules and supplements. Other requests included bank account records and monthly balance sheets from July 2002 through the present.

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[1] Later, on appeal, counsel contends that the petitioner has no legal obligation to maintain audited financial statements, but does not discuss this regulation or overcome its requirement of them, if the petitioner relies on financial statements to prove its ability to pay the proffered wage.

In response to the RFE, counsel asserted that the petitioner was forwarding audited financial reports, but the record does not support this claim of an audit. The petitioner and certified public accountant (CPA) offered only the "Financial Report (Reviewed)," as of December 31, 2000, 2001, and, ultimately, on appeal 2002 (unaudited statements).[2] Counsel provided monthly balance sheets of the petitioner for July 31, 2002 to February 28, 2003, but there was no indication of their source or audit (unaudited statements).

Also, in response to the RFE, counsel transmitted the petitioner's Forms 941 for successive quarters, i.e., for the 2002 fourth quarter (2002 Q4) and 2003 Q1. The payroll supplement reported the beneficiary's earnings, both for the quarter and the year to date. For 2002 Q4, they were both $5,161.59, or $64,838.31 less than the proffered wage. For 2003 Q1 the beneficiary's earnings were $5,000.04, or $64,999.96 less than the proffered wage.

Counsel forwarded the petitioner's bank account records of three (3) accounts for July 2002 through the present. Counsel, on appeal, emphasized an account statement of March 31, 2003 from Vintage Mutual Funds, Government Assets Fund, T Shares (Vintage fund) with a balance of $258,832.41. The AAO will discuss them below.

The director considered unaudited statements, bank statements, and Forms 941 and supplements, determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and continuing to the present, and denied the petition on June 20, 2003.

On the appeal, received July 22, 2003, counsel's brief encompasses six (6) contentions, lettered a-f, and nine (9) exhibits. Exhibits 5-8 are the petitioner's 1999-2002 Forms 1120S, U.S. Income Tax Return for an S Corporation. The 2002 Form 1120S applies most directly to the petitioner's ability to pay the proffered wage as of the priority date, but the petitioner has prominently stamped each page as a "PRELIMINARY DRAFT."

Counsel's brief, in letter e, says of exhibit 8 and, generally, of the record that:

> e. **The Petitioner's federal tax returns are enclosed as additional evidence.** Because the Petitioner's 2002 tax return had not yet been filed, and because the Petitioner submitted substantial amounts of alternative, relevant evident specifically requested by the RFE regarding its ability to pay the proffered wage, it did not previously include its federal tax returns in response to the [RFE]. However, as additional evidence for consideration at this time, the Petitioner submits its federal tax returns for 1999, 2000, 2001 and 2002. . . .
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> . . . In 2002, the [p]etitioner experienced a loss for the first time in its 63-year history. However, this is unusual, and the three prior tax returns demonstrate that the Petitioner regularly operates at a profit, even after all payments to the shareholders of the company have been made for a particular year. In the aggregate, the Ordinary Income figure appearing in the past four years' tax returns ($614,633 in the aggregate, as highlighted in the Exhibits) is more than sufficient to pay the Beneficiary's $70,000 wage for many years to come; further, additional company growth and profitability are projected, and the Petitioner expects to continue to pay the Beneficiary his entire wage for the foreseeable future. . . .

[2] The CPA acknowledged that the information consisted only of representations of management, that the review of the CPA was substantially less in scope than an audit in accordance with auditing standards, and that the unaudited statements did not warrant any expression of the opinion of a CPA.

Counsel suggests that Citizenship and Immigration Services (CIS), formerly the Service or INS, should average one (1) ordinary loss in a history of 63 years over an arbitrary number of years. This loss of ($210,470), however, included the priority date. CIS does not prorate any arbitrary, selected period of income, against the annual basis of the proffered wage to establish the ability to pay the annual proffered wage.[3]

Especially in relation to the priority date, the petitioner must establish the elements for the approval of the petition at the priority date. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel's reasoning, as set forth above, goes farther yet. It relies on company growth and profitability in the foreseeable future without any documentation to buttress this sanguine projection.[4] Counsel's brief displays results to the contrary from federal tax returns for 1999-2002. That table charts a straight decline from annual ordinary income of $458,005 to an ordinary loss ($210,470). It does not augur a promising future.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

With the endorsement of [redacted] U.S. Congressman, Illinois (16th district) [redacted] the petitioner's controller, under the date of July 1, 2003, submits on appeal, as exhibit 9, an "Explanation of how [the petitioner] has the ability & has already shown that they can pay [the beneficiary] the prevailing wage" (Aldrich2 [redacted] insists that the petitioner has already shown that it has paid the beneficiary the proffered wage with amounts in addition to those appearing on Forms W-2 for 2001 and 2002, i.e., $14,777.60 and $16,187.78, as noted above [redacted] cludes a table, in 1.), said to be additional commissions that the petitioner paid to the beneficiary. It charts "Vinlex Export Sales," "Less: Purchases from [the petitioner]" and "Net Commisssions)Revenues earned from [the beneficiary's] sale of [the petitioner's] products."

Neither this, nor any other document in these proceedings, identifies Vinlex Export Sales or shows its connection with the petitioner [redacted] offers no definition of "Revenues earned," "net commissions," or their amalgam. Extensive legends for the table in 1.) do not define [redacted] Export department." References to a "List Price less a discount of 30% & less another 20%" lead to a consideration of the beneficiary's export of goods to distributors. The export is done "less a discount of 30%, therefore he is able to make more than a 20% commission on a sale depending on whom the customer is."

The AAO confesses that the table in 1.) and its text do not clarify how discounts to list price result in a commission earned. *See* Aldrich2. CIS is unable to conjure income, either to the petitioner or the beneficiary, from repeated discounts off list price. Notably, the claim, in Aldrich2, that the petitioner paid the beneficiary

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[3] Counsel selected 1999-2002, four (4) years in this instance. Collecting the terms of ordinary gains and losses for that period, then dividing by four (4), counsel concluded that the average sufficed to pay the proffered wage for the foreseeable future.

[4] Aldrich1 concedes that past results do not indicate success in the critical area of the petitioner's export business.

$94,030 in 2001 is contradicted by the beneficiary's 2001 Form 1040, Individual Income Tax Return. As initially submitted with Form ETA 750, it reported the beneficiary's adjusted gross income (AGI) as $1,609 and included the amount reflected on the W-2. Nowhere did it contain any such sum as $94,030.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

Moreover, the Form ETA 750 certified the position for the payment of a salary of $70,000. Aldrich2 says that $20,000 is salary from Forms W-2, but neither an employment document nor a W-2 shows an amount that large. CIS cannot accept the rest as being from commissions, even if their computation were understandable. The petitioner must qualify its offer in accordance with the terms of the Form ETA 750, Part A, block 12 a. They do not authorize compensation for the proffered position in "Net commissions" or "revenues earned." In any case, the petitioner failed to document their definition or existence until the appeal.[5] Moreover, the beneficiary did not report them, in addition to a base salary, on Form 1040.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services (CIS), formerly the Service or INS, must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at or after the priority date. If documentary evidence supports the employment of the beneficiary at a salary equal to, or greater than, the proffered wage, such evidence is *prima facie* proof of the petitioner's ability to pay the proffered wage. In the present matter, Forms W-2 indicated the payment of $16.187.78 to the beneficiary in 2002, as of the priority date, less than the proffered wage.

If the petitioner does not establish that it paid the beneficiary wages at least equal the proffered wage for any relevant period, CIS will next examine the petitioner's net income, as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by

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[5] The RFE put the petitioner on notice to produce evidence of amounts of wages paid to the beneficiary, but none was forthcoming until the presentation of Aldrich 2 on appeal. If failure to produce requested evidence precludes a material line of inquiry, the director may deny the petition. *See* 8 C.F.R. § 103.2(b)(14). The AAO will not consider such evidence first presented on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc.,* 623 F.Supp at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered gross receipts or income before expenses were paid rather than net income. Similarly, wages paid to others do not justify the ability to pay the beneficiary the proffered wage. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The petitioner, however, showed an ordinary loss of ($210,470) for 2002, as of the priority date. If wages paid to the beneficiary and the net income of the petitioner are less than the proffered wage, CIS will review the petitioner's net current assets.[6] The proof of net current assets requires a federal income tax return with Schedule L, in this case, or an audited statement. Though the petitioner submitted monthly balance sheets with the RFE, they were not audited. Similarly, the 2002 preliminary draft carries no more weight than unaudited statements. The regulation requires a federal income tax return. *See* 8 C.F.R. § 204.5(g)(2).

Instead of the federal tax return, counsel urges the AAO to consider "cash flow," as reflected in three (3) accounts. The minimum ending balance in the Vintage fund, from January 1, 2002 to March 31, 2003, was of $258,832.41. One set of statements of AMCORE Bank (AM1) had a median ending balance of $82,413.26 for July 1, 2002 to March 31, 2003. The other (AM2) showed a median balance of $7,125.91 for July 1, 2002 to March 31, 2003.

The petitioner's reliance on its commercial bank statements in order to demonstrate sufficient cash flow to pay the proffered wage is misplaced. First, bank statements are not among the types of evidence specified for proof of the ability to pay the proffered wage in 8 C.F.R. § 204.5(g)(2). This regulation allows additional material in "appropriate cases," but the petitioner has not shown that the prescribed documentation is inapplicable, inaccurate, or unavailable. Moreover, the consideration of cash or cash equivalents in accounts, apart from net current assets, reflects merely an isolated element of net current assets and does not allow a conclusion.

These proceedings contain crucial contradictions and doubts concerning several matters of evidence detailed above. They even raise a doubt that the petitioner's job offer complies with the obligation to provide a salary, rather than merely commissions to the beneficiary. The petitioner believes that the job offer is for a "base amount" of $20,000 in contravention of Form ETA 750 ($70,000), although Forms W-2 do not support the

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[6] The difference of current assets minus current liabilities equals net current assets readily available to pay the proffered wage. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the period.

payment of even $20,000 to the beneficiary. This record provides a weak basis to establish exceptions and loosen explicit requirements of 8 C.F.R. § 204.5(g)(2).

Nonetheless, the AAO has scrutinized the applicability of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) to the evidence in these proceedings. It relates to a petition filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. By contrast, the petitioner's gross receipts and ordinary income have declined to an ordinary loss.

During the year in which the petition was filed in *Sonegawa*, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

By contrast, the petitioner in this appeal has identified no extraordinary business costs or interruption of business. Also, this petitioner offered no documentary evidence of the prospects of the recovery of business and no evidence of its outstanding position as a manufacturer of pneumatic tools and equipment. No unusual circumstances, parallel to those in *Sonegawa,* have been shown to exist in this case, nor has it been established that 2002 was an uncharacteristically unprofitable year for the petitioner. For these additional reasons, CIS may not excuse the absence of any form of prescribed evidence for the priority date.

After a review of the petitioner's and the beneficiary's federal tax returns, Aldrich1 and Aldrich2, unaudited financial statements, bank statements, Forms 941, and counsel's brief with the RFE and on appeal, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.